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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 988

DESSER, RAU & HOFFMAN and JACK L. RAU, individually,

Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Desser, Rau & Hoffman and Jack L. Rau, individually, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 8, 1957, petition for rehearing being denied March 6, 1957.

Opinion Below.

The opinion of the Court of Appeals is as yet unreported and for the convenience of the Court is appended to this petition. No opinion was rendered or filed by the

District Court of the United States for the Southern District of California, Central Division, affirming the order of the Referee in Bankruptcy, David P. Head, from which order and judgment of the District Court, the appeal to the Court of Appeals was taken. The District Court approved and adopted the findings of fact and conclusions of law of the Referee, which appear in the printed transcript of record filed in the Court of Appeals (nine copies of which have been heretofore filed herein) at pages 9 to 13 inclusive.

Jurisdiction.

The jurisdiction of this Court is invoked on the following grounds:

The date of the judgment sought to be reviewed, and its entry, is January 8, 1957, and the date of the order denying the petition for rehearing, filed February 25, 1957, pursuant to order of the Court of Appeals, is March 6, 1957.

Jurisdiction of this Court to review the judgment is believed to be conferred under United States Code, Title 28, Section 1254(1) and United States Code, Title 11, Section 47.

Question Presented for Review.

In a case where a party deposits funds with its attorneys, with which to create a special bank account in the name of one of their partners to be used for the purpose of drawing checks thereon, to pay obligations of the client; and where the attorneys, in handling the client's business, had theretofore made certain cash, out-of-pocket expenditures for the client; and before the funds had

been entirely expended the client became bankrupt and the purpose of the special account thus ended,—are the attorneys to be excluded from claiming a set-off for their out-of-pocket expenditures under Section 68(a) of the Bankruptcy Act which allows set-offs in all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, on the ground that, as claimants to the set-off, they did not have an antecedent and independent right in or to the fund or a portion thereof by way of lien or otherwise?

Statutes, Orders and Rules Involved.

Section 68(a) of the Bankruptcy Act provides:

> "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." (Title 11, U. S. C., Sec. 108.)

General Order No. 37 in Bankruptcy, as amended by the Supreme Court of the United States on January 16, 1939, provides, in proceedings under the Bankruptcy Act, the Rules of Civil Procedure shall, insofar as they are not inconsistent with the Act itself, or with General Orders in Bankruptcy, be followed.

Rule 13(b) of the Federal Rules of Civil Procedure provides:

> "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject of the opposing party's claim."

Statement of the Case.

On January 21, 1955 petitioners filed their petition with Referee in Bankruptcy, David B. Head. The facts alleged therein were not controverted by answer, were not contradicted by countervailing evidence, are admitted by the respondent and are found as facts by the Referee. [Printed Transcript Record filed in the Court of Appeals, and on file herein, pp. 9-12.] Therefore, it concededly appears that during the year prior to bankruptcy, from December, 1953 to December, 1954, petitioners, in connection with their representation of the bankrupt corporation, expended of their own funds the sum of $3,217.68 for transportation, hotel accommodations, long distance calls, etc., all of which are itemized in Exhibit A to the petition, which is included in said printed transcript of record, pages 3 to 5. The petition alleged, and it is not denied, that during the time the petitioners represented the bankrupt, they never voted for fees, requested payment for services, or received any money as fees, and that the amount claimed does not represent any charge for services.

On or about December 20, 1954, "for the purpose of protecting its incoming funds and making certain essential disbursements therefrom, petitioners, Desser, Rau & Hoffman, acting as attorneys for the company and selecting one of their partners, Jack L. Rau, opened at the Union Bank & Trust Company of Los Angeles, a bank account designated as, 'Jack L. Rau, Special Account,' in which funds of the publishing company were deposited and out of which disbursements were made."

Thereafter, on December 31, 1954, an involuntary petition in bankruptcy was filed in the District Court against

the company. Promptly, on January 5, 1955, petitioners rendered an accounting of receipts and disbursements to respondent, George T. Goggin (then Receiver, later Trustee in Bankruptcy) showing the sum of $16,163.15 remaining in the Special Account, remitting the sum of $12,945.17 to the Receiver, retaining in the account the sum of $3,217.68, the amount of their out-of-pocket expense. On January 21, 1955 they filed their petition with the Referee setting forth the foregoing facts and praying that an order be entered authorizing them to reimburse themselves, out of the account, their cash advances made on the bankrupt's behalf in the sum of $3,217.68. The Referee issued an order to show cause why an order should not be entered granting the prayer of the petition.

Upon the return of the order to show cause, no sworn testimony or other evidence was introduced, the Referee concluding that from the face of the petition it appeared that petitioners were not entitled to set off, counterclaim or retain the amount requested in reimbursement for their cash expenditures. Permission to file briefs, however, was granted, and after the submission of written presentations of the respective positions of the parties, the Referee denied the prayer of the petition and ordered that petitioners, the firm of Desser, Rau & Hoffman, and Jack L. Rau, individually, pay to the Trustee in Bankruptcy the sum of $3,217.68, the amount held in the Special Account.

On January 11, 1956 the District Court affirmed the order of the Referee and approved and adopted his findings of fact and conclusions of law. It was from this

order of the District Court that the appeal to the court below was taken.[1]

The jurisdiction of the District Court for the Southern District of California, Central Division, is based upon Section 1334, Title 28, U. S. C. The jurisdiction of the Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294, Title 28, U. S. C.

Reasons Relied Upon for Allowance of the Writ.

The amount here in controversy, true, is small but the principle involved is of extreme importance in the administration of estates in bankruptcy. The question presented has not been directly answered by any opinion of this Court and needs precise announcement for the guidance of lower courts when the same issue is presented in the future, as, from the nature of the problem, is bound again repeatedly to arise. Moreover, opinions of the various courts of appeal are not in such fundamental accord as to provide a uniform and determinative principle. The well considered cases (including a case decided by the Court below, *Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 799 (C. C. A. 9)), in analogous situations clearly indicate that the court below was wrong and that its decision in the instant case should be reversed.

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[1]The Trustee in Bankruptcy made no contention touching the the subject of avoidable preference, nor did the Referee, in his findings of fact or conclusions of law, consider the subject. The Court of Apepals said that in the view it took of the law the question of voidable preference was not reached. It is believed, therefore, that these petitioners should not attempt to anticipate any question which may arise in the mind of this Court, leaving unbeclouded the issue presented by the decision of the Court of Appeals, which, it is respectfully suggested, is of such importance that it should finally be determined by this Court.

The court below held that the set-off of petitioners for cash advances could not be allowed because, (1) petitioners possessed no independent right to or lien upon funds in their hands which they held as agents of the bankrupt, and (2) because they had no attorneys' lien thereon under California law, and (3) because the allowance of the set-off would be inconsistent with the purposes of the trust. Petitioners' position is that the nature of their claim against the bankrupt and of their obligation to the bankrupt is not decisive against them; that the respective claims are mutual under Section 68(a) of the Bankruptcy Act; that they are not required to possess an independent right to, or lien against, funds in their hands, in order to claim a set-off; that they are not claiming by virtue of any lien, as attorneys or otherwise; and that the purposes of the trust have been terminated by bankruptcy, leaving only the obligation to repay the remaining unexpended balance to the Receiver or Trustee. Petitioners urge, also, that Rule 13 of the Federal Rules of Civil Procedure (made applicable to proceedings in bankruptcy under General Order No. 37 in Bankruptcy as amended by this Court), the judicial policy of the nation with respect to set-offs and counterclaims is announced and is to be considered in the decision of the instant case.

I.

The Claim of the Bankrupt and Its Trustee Against Petitioners for the Payment and Return of the Balance of the Funds in the Special Account and the Claim of Petitioners Against the Bankrupt and Its Trustee for Out-of-Pocket Expenditures of Cash by Petitioners on Bankrupt's Behalf, Present a Case of Mutual Debts and Mutual Credits Within the Meaning of Section 68(a) of the Bankruptcy Act.

It will be noted at the outset that the purpose of the Special Account was terminated by bankruptcy. Although it may be true that while the account was active and used for the purpose intended, petitioners could not elect to pay themselves, but after the termination of purpose and usability, all that remained to be done was to pay the balance to the bankrupt's Receiver or Trustee. This obligation was a simple one for the payment of a fixed and undisputed sum. Therefore, at the time of the bankruptcy petitioners owed and were obligated to pay the sum of $16,163.15. At the same time the bankrupt owed petitioners $3,217.68. The actual balance of money due from petitioners was $12,945.45 which was immediately paid. This balance represents the net and full obligation of the petitioners.

In its opinion the Court below conceded that there are some cases where an off-set has been allowed where fiduciary duties exist between the parties, but held that where the *res* is one in which the agent has no beneficial interest, the purposes of the trust are inconsistent with the allowance of mutual debts or credits as between the Trustee, as a trustee, and separate creditor of the beneficiary-debtor.

The Referee and the District Court decided that the fund was not held by petitioners' partner, Rau, "as his own" but as trustee or agent of the bankrupt which was the legal owner; and that, therefore, no mutuality of debts or credits was involved. [Printed Transcript of Record filed with the Court of Appeals, and on file herein, pp. 8 and 12.] The Court of Appeals did not go so far, holding that petitioners had no independent right to seize and hold any part of the fund, absent some independent right or lien. Actually, petitioners did not claim the right to withhold the fund or any part thereof as their own, or by virtue of any property interest or lien. They prayed to be allowed to set off the amount of their claim as against the claim of the bankrupt, which was admitted as owing to the bankrupt, and to pay the net balance.

There is an essential difference between a claim to a portion of the fund by way of title thereto or lien thereon and the fundamental theory of set-off. Attempting to distinguish the present case from its own decision in *Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 799, the Court of Appeals said that, absent bankruptcy, petitioners could not have asserted any lien against the money in the special account, evidently under the belief that the decision in the *Half Moon* case was based upon some kind of lien. Apparently the Court forgot that, in that case, the counterclaimant had forfeited and was held to have no lien. In the *Half Moon* case it appeared that a produce grower, shortly before bankruptcy, consigned melons to a commission merchant who had made *previous and independent advances* to the grower for which the bankrupt was indebted to the commission merchant. In reversing the order of the Referee, which was confirmed on other grounds by the District Judge, the Court below,

at page 801 of its opinion, made particular reference to "the broad significance given to the phrase 'mutual credits.'" The Court followed *Murray v. Riggs*, 15 Johns. (N. Y.) 571; 592, in which that court said that "mutual credit was not confined to pecuniary demands, *but extended to all cases where the creditor had goods in his hands of the debtor and which could not be got at without an action at law or bill in equity.*" (Emphasis supplied.)

In its opinion in the *Half Moon* case the Court below considered with approval the case of *Goodrich v. Dobson*, 30 Fed. Cas. No. 18279, page 1081, in which a manufacturer of cloth consigned goods to a New York merchant for sale. In approving that opinion the Court below said:

> "The property was sold after the bankruptcy and the amount derived therefrom applied upon an outstanding indebtedness owed by the manufacturer to the merchant."

The "broad significance" mentioned by the courts given to the phrase "mutual credit" is further exemplified by *In re W & A Bacon Co.*, 261 Fed. 109, 111 (D. C. Mass.). There the creditor had a claim for services for delivering parcels for the bankrupt store prior to bankruptcy. At the time of bankruptcy the creditor had a sum of money in its hands received as payments for goods delivered for the bankrupt to its customers.

In another decision by the Court below, *Fidelity & Deposit Co. of Maryland v. Duke*, 293 Fed. 661, 665 (C. C. A. 9) (a bank liquidation case) the court said:

> "Doubtless it will be conceded that set-off does not depend upon the variety of the contract or the character of the parties."

The Seventh Circuit, in *In re Field Heating & Ventilating Co.*, 201 F. 2d 316, said that whether the debts are mutual depends upon "whether each owes the other." The Court said also, at page 318:

> "We keep in mind that to justify set-off it is not necessary that the debts be of the same character; claims of different species may be set off if they are mutual."

Again, in *In re Rosenbaum Grain Co.*, 103 F. 2d 656 (C. C. A. 7), the Court approved the District Court's order allowing a set-off as between a grain broker and his customer. The court refused to make a distinction between such a situation and a stockbroker and his customers where the relationship was one of pledgee-pledgor.

The Eighth Circuit, in *First National Bank v. Malone*, 76 F. 2d 251, 254, said that a set-off is allowed "upon the theory that in good conscience one ought not to pay his creditor if he cannot ultimately compel his creditor to pay the debt due to him."

This Court, in *Studley v. Boylstone National Bank*, 229 U. S. 523, indicated a broad, realistic and equitable approach to the claim of the right of set-off, saying, "Such counterclaims can be asserted as a defense or as a voluntary act of the parties, because it is grounded upon the absurdity of making A pay B when B owes A."

The decision of this Court in *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, the single authority relied upon by the court below, is not in point. In that case there had been a long course of dealing between the Tie Company and Harrison, the bankrupt, in which the Tie Company's employees bought merchandise from Harrison who would make a record of such purchases and

forward it to the Tie Company which would deduct the amounts of the various employees' indebtednesses to Harrison from the pay due to them, and remit such sums to Harrison in full, regardless of how much Harrison might be indebted to the Tie Company at the time of the remittances. These deductions represented, not amounts owing to Harrison by the Tie Company, but by the latter's employees individually. Thus when the Tie Company determined to hold and keep amounts deducted from payrolls, and, credit such amounts to the indebtedness of Harrison, it was attempting to extinguish the liability of other persons to the bankrupt, and allow, as a credit, the amount thereof against the bankrupt's indebtedness to it. As this Court said, at page 507:

> "We think the findings establish that Harrison sold the goods, not to the Tie Company, but to the laborers, and, therefore, the result of the sale was to create an indebtedness for the price alone between Harrison and the employees."

This Court said, further, that the facts found established a course of dealing between Harrison and the Tie Company under which the Tie Company was under an obligation to remit the money collected from the laborers irrespective of any debt which he might owe the company. It was because of this established course of business that the Court held the Tie Company was not entitled to retain the proceeds of collections from its employees.

It is believed that the frequently and broadly asserted belief that a fiduciary may not set-off, in bankruptcy, an indebtedness to him of his principal, stems from unsupported textbook statements sometimes cited by the courts without analysis. For example, in 4 *Collier on Bankruptcy* (14th Ed.), 726, it is said that where the liability of one

claiming set-off, "arises from a fiduciary duty or is in the nature of a trust, the requisite mutuality of debts or credits does not exist, and such persons may not set off a debt owing from the bankrupt to such liability." But in the voluminous footnotes to the broad generality of the text it appears that some fiduciary duty was violated by the claimant, such as breach of duty by a corporate officer (*Putnam v. Handy*, 251 Mass. 196); or breach of duty by a corporate director, *Walker v. Man*, 253 N. Y. Supp. 472, or involved money fraudulently received by a controlling stockholder, *Lytle v. Andrews*, 34 F. 2d 252 (C. C. A. 8); or misapplication of the subject of the trust, *Morris v. Winsor Trust Co.*, 213 N. Y. 27, 106 N. E. 753.

In a further footnote, Collier goes on to say (p. 727, fn. 20) where a claimant against a bankrupt's estate is also indebted to the estate upon a debt arising from his possession of property belonging to the bankrupt, his duty to account to the bankruptcy trustee cannot be set off against the bankrupt's debt to him, "*if his possession was wrongful, but, if his possession was obtained with the bankrupt's consent, the debts are mutual and subject to set-off.*" The author cites *Bristol v. Killanna Corp.*, 85 F. 2d 667 (C. C. A. 2). So, also in *Levy v. Drew*, 4 Cal. 2d 456 (cited by Collier), the Court, adopting and quoting from one of its own prior opinions, said at page 460:

> "The rule is consistently applied in the Federal Court that where a debtor, prior to bankruptcy, voluntarily places in the hands of his creditor, assets for the particular purpose of extinguishing a debt, and bankruptcy occurs, the creditor can offset his demand against the claim of the trustee in bankruptcy for a return of the assets to the bankrupt estate."

The necessity for final definition of the expression "mutual debts or mutual credits" by this Court seems to be apparent.

II.

The Court Below Was in Error in Holding That Rule 13 of the Rules of Civil Procedure Has No Relevance to the Instant Situation.

The court below said that petitioners advanced the theory that Rule 13(a) of the Rules of Civil Procedure strengthened their position under Section 68(a) of the Bankruptcy Act, and said that it could not agree that this procedural rule would grant a substantial substantive right which did not otherwise exist.

Petitioners urged upon the court below that the Federal Rules of Civil Procedure furnish additional support for petitioners' contentions as to the propriety of the allowance of their set-off or counterclaim against the demand of the Trustee for the payment of the balance of funds in the special account, because bankruptcy courts proceed, whenever possible, under Federal Rules of Civil Procedure which now specifically authorize set-offs and counterclaims, even where not arising out of the same transaction and even where the respective claims are completely different in nature and in substance and in the form of the remedy.

Section 68(a) of the Bankruptcy Act is itself essentially procedural, providing as it does that where claims against and claims of a bankrupt are "mutual" they may be set off and the actual balance only paid. Under Rule 13 all semblance of older technical requirements, all of the rules and dicta respecting the nature or special character of the indebtedness or indebtedness as to which there are claims and counterclaims, are swept away in the

interest of substantial, quick and economical justice. Rule 13a provides that a pleading *must* state as a counterclaim any claim which arises out of a transaction or occurrence. Under subdivision (b), the provision here applicable, it is provided, "a pleading may state as a counterclaim *any claim* against an opposing party *not arising out of the transaction or occurrence* that is the subject matter of the opposing party's claim. "The legislative history of Rule 13 reveals an almost limitless breadth of liberality."[2]

Under General Order No. 37 in Bankruptcy, as amended by this Court on January 16, 1939, it is provided that, in proceedings under the Bankruptcy Act, the Rules of Civil Procedure, shall, insofar as they are not inconsistent with the Act itself or with General Orders in Bankruptcy, be followed.

It is believed that Rule 13 of the Federal Rules of Civil Procedure has the effect of still further broadening the already liberal interpretation given by the courts to Section 68(a) of the Bankruptcy Act. Being a definite expression of nationwide judicial policy in the matter of the recoverability by way of set-off of an admitted claim, it is believed that the court should take the rules into consideration in situations such as is involved in the case at bar.

The liability of petitioners, at the time of bankruptcy, was to pay a liquidated sum of money. At the same time the bankrupt owed petitioners a fixed sum for cash ad-

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[2]Interesting discussions as to the wide scope and purpose of Rule 13 appear in "Proceedings of American Bar Association Institute" held in Cleveland, page 247; Moore's Federal Practice, Vol. 1, page 645; Notes of the Advisory Committee on Rules, Title 28, U. S. C. A., page 514, and 25 Virginia Law Review 261.

vances. Petitioners' real indebtedness at that point in time was the actual net difference between these two obligations. It would seem that both Section 68(a) of the Bankruptcy Act and Rule 13 of the Federal Rules of Civil Procedure are designed to accomplish this end result.

Wherefore petitioners respectfully pray that this petition for Writ of Certiorari to review judgment of the Court of Appeals for the Ninth Circuit be granted.

JACK L. RAU,
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THEODORE E. REIN,
Of Counsel.

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

Desser, Rau & Hoffman and Jack L. Rau, Individually, Appellants, vs. George T. Goggin, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, Appellee. No. 15,073. Jan. 8, 1957.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: ORR, LEMMON and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Before its demise the Daily News of Los Angeles was published by the now bankrupt Stockholders Publishing Company, Inc. During the period December 1, 1953, to December 31, 1954, the company was represented by the Los Angeles law partners, Desser, Rau & Hoffman.

On December 31, 1954, a petition in involuntary bankruptcy was filed against the company. Subsequently an adjudication of bankruptcy was made. The lawyers were not only not paid for their services, which must have been extensive, but they are out of pocket moneys in the amount of $3,217.68 expended for stockholders on travel about these United States and for telephone toll charges paid. The accuracy of the balance has never been questioned.

On January 5, 1955, Desser, Rau & Hoffman reported to Goggin, then receiver and now trustee, that they held a balance of $16,163.15 belonging to Stockholders in a separate account established on December 20, 1954, in the Union Bank & Trust Co. of Los Angeles under the name of "Jack L. Rau, Special Account." Rau, of course, was one of the partners. Shortly after January 5, Rau re-

mitted the undisputed amount of $12,945.47 to the receiver. The balance then left $3,217.68, an amount exactly equivalent to Desser, Rau & Hoffman's out of pocket expenditures. Presumably the balance is still in the account. As to this sum, the lawyer partners claim a right of setoff. To this the receiver did not and does not accede.

Accordingly, on January 21, 1955, the lawyers filed a petition to establish the setoff before the referee who had the affairs of Stockholders for supervision. A hearing was held and the matter briefed by respective counsel. The referee held that Rau "held the moneys in the account as trustee or agent of the bankrupt and that the account was the property of the bankrupt." The setoff was disallowed and Rau was ordered to pay the balance of the money over to the referee. Review was had before the district court which sustained the referee. The order of the court now comes to this court on appeal.

It should be related that on December 18, 1954, Stockholders was in serious financial trouble and had authorized its attorneys (Desser among those attending the meeting) to file a petition for voluntary bankruptcy of the company. It also appears that the scheme for the account in Rau's name was arranged at the same meeting. The purpose of the account seems to have been to set aside funds for the immediate needs of the company in a temporary haven of refuge in the name of an agent with his principal undisclosed. No one has suggested that any aspects of the plan were less than honorable.

It appears that any amount expended by Desser, Rau and Hoffman after December 20, 1954, was almost *de minimis*. In other words most of the debt for moneys expended by the lawyers antedated the establishment of the Rau account. In the view this court takes of the law

applicable, the question of voidable preference is not reached, although it is argued in the briefs.

At the outset, this court is of the opinion that the case should be decided the same as it would be if the account had stood in the name of "Desser, Rau & Hoffman, special account." Rau had no real connections with the business of the Stockholders company other than his firm's business. We think what he was doing was in truth an act and conduct of the firm.

Thus we come to the application of Sec. 68(a) of the Bankruptcy Act, 11 U. S. C. A. §108(a), which reads as follows:

> "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It is our construction, after considering the decisions, that the lawyer partners are not entitled to setoff.

Here the firm and Rau had no duties with respect to the account but to disburse them as directed. They had no beneficial interest whatsoever in the account. It is true that there are some cases where perhaps some fiduciary duties exist between the parties and an offset has been allowed. But we are of the opinion that where the *res* is one in which the agent has no beneficial interest, nothing more than a desire now to be paid out of the *res*, that the purposes of a trust are inconsistent with the allowance of mutual debts or credits as between the trustee as a trustee and separate creditor of the beneficiary-debtor. At least that is the way we read Western Tie & Timber Co. v. Brown, 196 U. S. 502. While it is not a new case, its authority does not seem impaired.

While we think it unnecessary to ground our decision on the proposition, we think the California law on attorneys' liens affords a second block to the appellants. As we understand the California law, absent any bankruptcy, the law firm could not have asserted any lien against the money in the Rau account. (There obviously was no agreement for a lien.) See 6 Cal. Jur. 2d 410, *et seq.*, *Ex Parte* Kyle, 1 Cal. 331, Jones v. Martin, 41 Cal. 2d 23, 256 P. 2d 905. This proscription alone by California of the lien would distinguish our case of Half Moon Fruit and Produce Co. v. Floyd, 9 Cir., 60 F. 2d 799.

It is not our problem to here catalogue the cases where setoff is allowed. But we do think that where it is allowed against property in the creditor's hands the creditor must already have some beneficial interest of his own in or against the subject property, at least an equitable lien.

The partners rely on *In Re* W. & A. Bacon, D. C. Mass., 261 F. 109. There offset of a creditor's balance for services due from debtor was allowed against moneys collected by the creditor on C. O. D. deliveries for the account of the debtor. There the court found that the debtor long had acquiesced in the commingling of collections with the creditors' own funds and that there was no trust. And it seems clear enough that in Half Moon Fruit & Produce Co. v. Floyd, *supra*, the bankrupt's creditor had at least a qualified property right in the *res* in his hands.

Appellants advance the theory that Rule 13a, Rules of Civil Procedure, strengthens their position under Section 68(a) of the Bankruptcy Act. We cannot agree that this procedural rule would grant a substantial substantive right which did not otherwise exist.

We are convinced in the type of case of which this is one, where no right of setoff or any other right against the fund existed before bankruptcy that one cannot now establish the setoff.

Maybe as a matter of legislative policy a scrupulous faithful trustee should have as much right of offset for a collateral debt as those who commingled (with the consent of the rightful owners) in Bacon, *supra*, but our judgment is that we are not at liberty to give it.

The final order of the district court is affirmed.

(Endorsed:) Opinion. Filed Jan. 8, 1957.

Paul P. O'Brien, Clerk.